Residential Management, Inc. and 720 Riverside Owners Corp., Joint Employers *and* Rafael Ramirez. Case 2–CA–24877

July 23, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

The question presented here is whether the judge correctly found that the Respondent violated Section 8(a)(3) and (1) of the Act by terminating Rafael Ramirez because he supported the Union.[1]

The National Labor Relations Board has considered the decision and the record in light of the exceptions[2] and briefs and has decided to affirm the judge's rulings, findings,[3] and conclusions and to adopt the recommended Order as modified.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Residential Management, Inc. and 720 Riverside Owners Corp., joint employers, New York, New York, their officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Substitute the following for paragraph 2(c).

''(c) Post at its building and office copies of the attached notice marked Appendix.[4] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.''

[1] On April 6, 1993, Administrative Law Judge James F. Morton issued the attached decision. On April 26, 1993, the judge issued an errata to his decision. The Respondents filed exceptions and a supporting brief. The General Counsel filed a motion to strike the exceptions and a brief in support of the judge's decision.

[2] We deny the General Counsel's motion to strike exceptions. Additionally, because we have concluded that these exceptions lack merit, we find it unnecessary to grant the General Counsel's alternative request for an extension of time to file an answering brief.

[3] The Respondents has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule the administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

David E. Leach III, *David Pollack*, and *Nancy Reibstein*, *Esqs.*, for the General Counsel.

Jerold Probst, Esq., for Residential Management, Inc. and 720 Riverside Owners Corp.

DECISION

STATEMENT OF THE CASE

JAMES F. MORTON, Administrative Law Judge. The complaint alleges that Residential Management, Inc. (Residential) and 720 Riverside Owners Corp.[1] (Riverside) are joint employers and that they, in violation of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act), discharged an employee because he supported Local 32B-32J, Service Employees International Union, AFL–CIO (the Union). The answer places in issue the joint employer allegation and the reason for the employee's discharge.

I heard this case in New York City on September 24 and December 8, 1992, and on January 14, 1993. On the entire record, including my observation of the demeanor of the witnesses and after consideration of the brief filed by the General Counsel and the brief filed by counsel for Residential and Riverside, I make the following

FINDINGS OF FACT

I. JURISDICTION—LABOR ORGANIZATION

In Case 2–RC–20966, Riverside signed a Stipulated Election Agreement on November 24, 1990, in which it acknowledged that it is an employer which owns a residential apartment building and that, in its operations annually, it meets the Board's jurisdictional standard for such building.

The Union was certified in that case as the exclusive collective-bargaining representative of Riverside's employees.

II. THE JOINT EMPLOYER ISSUE

Residential manages the apartment building owned by Riverside. Residential's manager hires the employees in that building after receiving approval therefor from Riverside. He also directs the work of the superintendent and the porter who take care of the building. I find that Residential and Riverside are the joint employer of these employees. In that regard, see *Uptown Associates*, 307 NLRB 1286 (1992). See also *Maayan Estates*, 253 NLRB 1214 (1981).

III. THE ALLEGED UNFAIR LABOR PRACTICES

Riverside bought the apartment building in August 1989. It asserts that, at that time, there was only one maintenance employee for that building, the building superintendent, Jonathan Rodriquez, and that it hired the Charging Party, Rafael Ramirez, a month later as a temporary employee. It contends that it hired Ramirez to assist Rodriquez for the approximately 1-1/2-year period that the building was undergoing extensive refurbishing and that it terminated his employment solely because his services were no longer needed, i.e., when the renovation work was substantially completed at the end of 1990. The General Counsel's position is that Ramirez had worked steadily at the building as a porter, assisting Rodriquez, since 1987 and that he was discharged because he voted for the Union in the election held in Case 2–RC–20966.

[1] The name appears as corrected at the hearing.

Ramirez testified that he began working as a porter at the building in 1987, 2 years before Riverside bought it. He related that he worked full time for the prior owner, that he was paid in cash each week, and that no deductions were taken from his wages for taxes. He related further that a woman named Vicky managed the building then and that she was the one who referred him to Joshua Frankel, the managing agent for Residential, and that she told him, Ramirez, that there was a new owner of the building. Ramirez went to Frankel's office where he was asked for his name and social security number. His testimony was that he continued to work at the building without interruption, doing the same work. The only change, according to him, was that he was paid by Riverside's checks, from which deductions were made.

Frankel testified that, when Riverside bought the building in August 1989, there was only one maintenance employee there, Rodriquez, and that he, Frankel, arranged to have Ramirez hired a month later as a temporary employee after getting approved to do so from Riverside's president, Labe Twerski. Twerski did not testify.

Payroll records of Riverside show that Ramirez earned $1200 in the third quarter of 1989. His salary was $200 per week. Thus, he worked 6 weeks in that quarter. As that quarter ended on September 30, it is evident that he started working for Riverside when it bought the building in August, and not a month later as Frankel's account would have it. I credit Ramirez' account that he had worked steadily at that building as a porter since about 1987. Frankel's account as to the circumstances of Ramirez' hiring was not corroborated either by Twerski or by Rodriquez, whom Frankel named as the person who was authorized to hire Ramirez.

Ramirez and Rodriquez signed union authorization cards in 1990. The Union thereupon filed the petition in Case 2–RC–20966. As noted above, a Stipulated Election Agreement in that case was signed. The election therein was held on December 12, 1990. The Union won, 2–0. Obviously, both Rodriquez and Ramirez had cast their ballots in favor of representation by the Union. On December 20, the Board issued a certification of representative to the Union. Four days later, Riverside's president, Twerski, wrote Ramirez, stating, ''as per our agreement when you were hired, we are hereby terminating your employment as of January 4, 1991.'' There is no evidence of such agreement in the record testimony as to the circumstances in which Ramirez became an employee of Riverside.

On the same date, December 20, that the certification of representative was issued to the Union, Riverside's counsel sent to the Board's Regional Office a copy of a handwritten note, signed by Building Superintendent Rodriquez which stated that he had mistakenly voted for the Union as he had ''intended to write NO.'' Although Respondent's counsel asked, in his letter, to discuss this matter, the record before me does not disclose whether there was any response.

Ramirez' employment ended on January 4, 1991.

After the Union was certified, one of its business agents asked Frankel to meet with him for the purpose of negotiating a collective-bargaining agreement for Riverside's employees. The Union's business representative testified credibly that Frankel told him that his ''lawyer should never have agreed to an election and that he is not going to deal with the Union.'' As a consequence the Union, on January 18, 1991, filed an unfair labor practice charge in Case 2–CA–25257, alleging that Riverside unlawfully refused to bargain collectively with it. A complaint issued in that case and had been consolidated for hearing with the complaint in the instant case. After the hearing opening, an informal settlement agreement was reached in that case, and, as result, that case was severed from this one.

The credited evidence in this case discloses that Ramirez had been employed by Riverside as a full-time employee, that he signed a union authorization card and voted for the Union, that Riverside had to be aware that he supported the Union by having voted for it, that Riverside decided to discharge Ramirez virtually at the moment the Union was certified as bargaining agent, that Ramirez was informed by Riverside that he was discharged pursuant to an ''agreement'' that did not exist, and that Frankel then was not the least bit disposed to accept the Union as the employees' bargaining representative. I find, based on these considerations,[2] that Ramirez' support for the Union was a factor in the Respondent's decision to discharge Ramirez and, accordingly, I find also that the General Counsel has made out a prima facie showing that Ramirez had been discharged to discourage support for the Union.

Under the Board's holding in *Wright Line*, 251 NLRB 1083 (1980), the Respondent has the burden, once a prima facie case has been established, of proving that it would have, nonetheless, taken the same action for a nondiscriminatory reason. To that end, the Respondent offered Frankel's testimony that extensive renovation work was begun at the building in the latter part of 1989 and that it was substantially completed at the end of 1990. The Respondent's records further listed only Rodriquez as maintenance employee throughout 1991. Frankel further testified, however, that, at the beginning of 1992, a number of maintenance employees were hired in an effort to end a rent strike of Riverside's tenants. He related that several maintenance employees were hired then to take care of the tenants' complaints. That rent strike had led to a protracted suit by the tenants against Riverside.

The evidence adduced by the Respondent fails to persuade me that it would have discharged Ramirez for nondiscriminatory reasons, regardless of his union activities. Accordingly, I find that the Respondent discharged Ramirez in order to discourage its employees from supporting the Union.

CONCLUSIONS OF LAW

1. The Respondent is a joint employer within the meaning of Section 2(2), (6), and (7) of the Act.

[2] The General Counsel also sought to show that, almost immediately after Ramirez was discharged, the Respondent hired a replacement for him. The evidence thereon is inconclusive and confusing. Ramirez related that, a week after he was discharged, he saw a ''Mexican,'' named Dionel, doing the same work he did, cleaning the street and the floors. Later, he testified that a woman who manages the building told him 6 or 7 years ago that this individual, Dionel, was employed by the new landlord, apparently a reference to Riverside. He also testified, during his cross-examination, that he did not know the name of the person whom he claimed he saw working for Riverside. Ramirez' testimony as to whom he saw seems to be a confusion of events in early 1991 and occurrences that took place when he first began working at the building in 1987. I cannot place any weight on this aspect of his testimony.

2. The Union is a labor organization as defined in Section 2(5) of the Act.

3. The Respondent has engaged in an unfair labor practice within the meaning of Section 8(a)(1) and (3) of the Act by having discharged one of its employees on January 4, 1991, because he supported the Union.

4. This unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in an unfair labor practice in violation of Section 8(a)(1) and (3) of the Act, I shall recommend that the Respondent be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent unlawfully discharged its employee, Rafael Ramirez, I shall recommend that it be ordered to offer him immediate and full reinstatement to his former position or, if it no longer exists, to a substantially equivalent position. The Respondent shall further be ordered to make him whole for any loss of earnings and other benefits that he suffered as a result of his unlawful discharge, with backpay to be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and with interest to be computed in the manner set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). I shall also recommend that the Respondent remove from its records any reference to his unlawful discharge, provide Ramirez with written notice of the removal, and inform him that the unlawful discharge will not be used as a basis for future personnel action. See *Sterling Sugars*, 261 NLRB 472 (1982).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, a joint employer consisting of 720 Riverside Owners Corp. and Residential Management, Inc., New York, New York, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging any employee in order to discourage membership in Local 32B-32J, Service Employees International Union, AFL–CIO (the Union).

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Rafael Ramirez immediate and full reinstatement to his position of employment or, if it no longer exists, to a substantially equivalent position and make him whole, with interest, for any loss in wages and benefits he suffered as a result of his discharge, in the manner set forth in the remedy section above.

(b) Remove from their files any reference to his unlawful discharge and notify him in writing that this has been done and that his discharge will not be used against him in any way.

(c) Post at its building and office copies of the attached notice marked ''Appendix.''[4] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge any of you because of your union sympathies or union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Rafael Ramirez his job back and make him whole, with interest, for wages and benefits he lost because we discharged him for having supported Local 32B-32J, Service Employees International Union, AFL–CIO.

WE WILL remove all references in our files to his unlawful discharge and WE WILL notify him in writing that we did this and WE WILL also inform him in writing that his discharge will not be used against him in any way.

720 RIVERSIDE OWNERS CORP.

RESIDENTIAL MANAGEMENT, INC.